

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

**ANYWHERECOMMERCE, INC. and
BBPOS LIMITED,
Plaintiffs,**

v.

**INGENICO INC., INGENICO CORP., and
INGENICO GROUP SA,
Defendants.**

Civil Docket No: 1:19-cv-11457-IT

Jury Trial Demanded

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION IN LIMINE NO. 9 TO
PRECLUDE KERRY TIMBERS FROM TESTIFYING**

On March 31, 2023, Ingenico filed its witness list, which included Kerry Timbers. (Doc. No 234). Mr. Timbers was not included in Ingenico's initial disclosures, which were never amended to add Mr. Timbers. Mr. Timbers was not deposed. Federal Rule of Civil Procedure 37(c)(1) provides that if "a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."

There is no justification for Mr. Timbers late-disclosure. Ingenico knew (or should have known) that it at least wanted to preserve the right to call Mr. Timbers at trial by amending its initial disclosures prior to the close of discovery. It failed to do so, and permitting Ingenico to call him at trial nonetheless deprives Plaintiffs of the right to question him before trial. That is not permissible under the Rules. The proper remedy is exclusion of Mr. Timbers as a trial witness.

Respectfully submitted:

/s/ Melissa A. Bozeman

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Dated: April 10, 2023

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CERTIFICATE OF SERVICE

I, Melissa A. Bozeman, hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on

April 10, 2023.

/s/ Melissa A. Bozeman
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